ERNST & YOUNG

v.

MAXBIZ CORPORATION BHD

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HELILIAH MOHD YUSOF JCA
AHMAD MAAROP JCA
[CIVIL APPEAL NO: W-02-987-2007]
30 APRIL 2008

CIVIL PROCEDURE: *Striking out - Action - Breach of duty of care - Whether careful consideration given - Whether merits looked into by trial judge - Whether trial judge's dismissal of striking out application proper*

This was the defendant's appeal against the High Court's order dismissing its application to strike out the plaintiff's case. The plaintiff's case was for advice given by the defendant during a restructuring exercise upon which it had acted to its detriment. The defendant did not dispute the advice given but alleged that it was given with a caution thereby excluding the defendant from liability to the plaintiff.

Held (dismissing the appeal):
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) The existence of a duty of care in given circumstances is a mixed question of law and fact. The three-fold test affirmed by the Federal Court in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* calls for a meticulous examination of the fact and circumstances of each case. In particular the third limb of the test that it must be just, fair and reasonable to impose a duty of care requires careful consideration after mature argument. This is not an exercise that is suitable or appropriate to be undertaken on a summons to strike. (para 5)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan defendan terhadap perintah Mahkamah Tinggi yang menolak permohonannya untuk membatalkan kes plaintif. Kes plaintif adalah berhubung nasihat yang diberikan oleh defendan semasa penyusunan semula plaintif yang dikatakan telah

memudaratkan plaintif apabila dilaksanakan. Defendan tidak mempertikai nasihat yang diberi namun menyatakan bahawa ianya diberikan dengan peringatan yang sekaligus menjadikannya tidak bertanggungan terhadap plaintif.

Diputuskan (menolak rayuan):
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Kewujudan tanggungjawab untuk berhati-hati dalam sesuatu halkeadaan adalah merupakan campuran persoalan undang-undang dan fakta. Ujian hakikinya yang disahkan oleh Mahkamah Persekutuan di dalam *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* menuntut pemeriksaan rapi akan fakta dan halkeadaan setiap kes. Terutama mengenai jejari ketiga ujian tersebut bahawa ianya hendaklah adil dan munasabah untuk mengenakan tanggungjawab berhati-hati, di mana ini memerlukan pertimbangan yang teliti atas hujah-hujah yang matang. Ujian sebegini tidak sesuai untuk dibuat terhadap suatu saman untuk membatal.

Case(s) referred to:
Caparo Industries v. Dickman [1990] 2 AC 605 ***(refd)***
Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***
Mooney & Ors v. Peat Marwick Mitchell & Co [1967] 1 MLJ 87 ***(refd)***
Wenlock v. Moloney [1965] 1 WLR 1238 ***(refd)***

Legislation refered to:
Rules of the High Court 1980, O. 18 r. 19

For the appellant/defendant - Kelvin Seet (Wong Mun Hoe with him); M/s Cheang & Ariff
For the respondent/plaintiff - ST Geetha; M/s William Leong & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S1-22-940-2006]

Reported by Usha Thiagarajah

JUDGMENT
(Oral)

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

[2] This appeal is directed against the order of the High Court at Kuala Lumpur dismissing the application of the defendant (appellant before us) made under RHC O. 18 r. 19 to strike out the claim of the plaintiff (respondent in the appeal). The brief factual background against which this appeal rests is as follows.

[3] Geahin Engineering Berhad, which we will call the target company, is a public company limited by shares. Its shares are freely traded on the Stock Exchange at Kuala Lumpur. It became financially strained. The Stock Exchange was concerned. It acted under Practice Note 4 of its Listing requirements and told the target company to put its financial affairs in order or face de-listing. Later a scheme was formulated to financially rescue the target company. The defendant was the auditor of the target company. It also acted as the target company's adviser in the restructuring scheme. What the scheme amounted to is this. Two companies, Mayford Garments Sdn Bhd or Mayford, and another company called MKK Industries Sdn Bhd or MKK were to jointly incorporate a third company which was then to take over the assets and liabilities of the target company and inject capital into it. A company was then incorporated. It is the plaintiff. The plaintiff's case in the court below is that during the course of the restructure the defendant rendered advice to it upon which it acted to its detriment. The defendant's answer is that it did give the advice but that that advice was accompanied with a caution which sufficiently excluded the defendant from liability to the plaintiff.

[4] In addressing us on the appeal learned counsel for the defendant took us through his client's advice and other relevant documents at some length to demonstrate that the plaintiff would not succeed on its pleaded case. As such, so the argument goes, the pleading must be struck out and the learned judge in the court below erred in not making an order in terms of the defendant's summons.

[5] With respect we are unable to agree. It is well settled that the existence of a duty of care in given circumstances is a mixed question of law and fact. The three fold test formulated by the House of Lords in *Caparo Industries v. Dickman* [1990] 2 AC 605 and adopted by our Federal Court in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1 calls for a meticulous examination of the fact and circumstances of each case. In particular, the third limb of the test that it must be just, fair

A and reasonable to impose a duty of care requires careful consideration after mature argument. This is not an exercise that is suitable or appropriate to be undertaken on a summons to strike.

B **[6]** In a case as the present we can do no better than to quote from the judgment of Raja Azlan Shah J (as his Royal Highness then was) in *Mooney & Ors v. Peat Marwick Mitchell & Co.* [1967] 1 MLJ 87. There, the learned judge applied with approval the following passage in the judgment of Danckwerts LJ in *Wenlock v.* C *Moloney* [1965] 1 WLR 1238:

> But this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the D position of the trial judge.

[7] Here too, the plaintiff would have us trawl through the documents to make a pronouncement on the merits of this case. That in our view would indeed be a usurpation of the function of E the trial judge. Therefore it comes as no surprise, having regards to the facts and circumstances now before us, that the High Court dismissed the defendant's application.

[8] Before we conclude we must say something about how this appeal came to be argued before us. On 21 April 2008, that is to F say last Monday, this court was moved on a motion for an extension of time to file the appeal record against the order of the High Court. Having regard to the fact that this is an interlocutory appeal and any delay in its disposal may prejudice the speedy trial of the main action we directed the motion to be treated as an G appeal proper. We also dispensed with compliance of the Rules of the Court of Appeal 1994. Further, we directed the defendant to make available to us by way of affidavit all the cause papers that were before the High Court. That was done and we then directed the appeal to be taken this morning.

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[9] For the reasons already given, this appeal cannot succeed. It is dismissed. The appellant must pay the respondent the costs of this appeal. The deposit in court shall be paid out to the respondent to account of its taxed costs.

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